Filed 12/6/16 P. v. Espinoza CA6
Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CARLOS ESPINOZA, Defendant and Appellant.	H038508 (Monterey County Super. Ct. No. SS091887)

This case is before this court for a second time, after the California Supreme Court granted review, deferred briefing, and then transferred it back to this court for reconsideration in light of the recent opinions in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

Defendant Carlos Espinoza appeals after a jury convicted him of first degree murder (Pen. Code, § 187, subd. (a)[1]), attempted premeditated and deliberate murder (§§ 664/187, subd. (a)) and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury found that defendant committed the murder and attempted murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)), and that in committing the murder and attempted murder, he personally used and intentionally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subds. (b), (c),

[1] All further statutory references are to the Penal Code unless otherwise indicated.

(d)). The trial court sentenced defendant, who was 17 years old at the time he committed the offenses, to an aggregate prison term of 85 years to life.

On appeal, defendant originally contended: (1) the gang crime and gang enhancements must be reversed because the gang expert's opinion was based in part on testimonial hearsay, in violation of defendant's Sixth Amendment right to confrontation; (2) the judgment must be reversed due to jury misconduct because one juror visited the scene and told the other jurors what he observed; and (3) remand for resentencing is required because the sentence of 85 years to life constitutes cruel and unusual punishment in light of the fact he was a juvenile at the time he committed the offense. Two justices on the original panel agreed with defendant's third claim, and the original opinion in this case would have reversed the judgment and remanded for resentencing.[2] Both parties petitioned for review in the California Supreme Court, which granted review but deferred briefing pending its consideration of related issues in other cases. Pursuant to the California Supreme Court's order transferring the case back to this court for reconsideration in light of *Sanchez* and *Franklin*, and after receiving supplemental briefing from the parties, we now vacate the prior opinion. We find that *Sanchez* does not require reversal of defendant's convictions but that—as the parties agree—a limited remand is required pursuant to *Franklin*.

[2] While the original appeal was pending, defendant's appellate counsel filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. In his writ petition, defendant argued that he was deprived of the effective assistance of counsel because his attorney failed to object to the gang expert's opinion testimony. We disposed of the habeas petition by separate order filed on the same day the original opinion was filed. (*In re Espinoza*, summarily denied, January 31, 2014, H040305; see Cal. Rules of Court, rule 8.387(b)(2)(B).) The California Supreme Court denied defendant's petition for review of that order on May 14, 2014. (*In re Espinoza*, S217072.)

BACKGROUND

A. The Shooting

On August 6, 2009, Jose Perez was outside of his house on Terrace Street in Salinas. Perez was wearing a white t-shirt, shorts, and sneakers. He was talking to his friend Poncho, who was loaning Perez a bicycle. Perez was planning to ride the bicycle to football practice. According to his brother, Perez was not involved with gangs. Rather, he was "100 percent involved in sports," particularly football.

While Perez and Poncho stood outside, two cars turned onto Terrace Street: a gray primered Mitsubishi Galant, and a grayish-green primered Lexus. The cars stopped in front of the house. Defendant got out of the Galant, cocked a gun, and began shooting. Poncho started running. He looked back and saw Perez on the ground. He ran to a fence, then looked back again. Defendant shot at him, then shot Perez while standing over him.

Perez was later transported to the hospital, where he was declared deceased. Perez had multiple gunshot wounds, including some that had been fired at close range.

B. Prior Incidents Between Poncho and Defendant

Poncho knew defendant as "Flaco." He knew defendant from school. At school, defendant often engaged in "mugging" (staring at) him, and defendant would sometimes bump into him. Defendant had chased Poncho on two prior occasions. First, about three months before the shooting, defendant was in a car that tried to run Poncho over. Then, about one and a half months before the shooting, defendant chased Poncho while driving.

Poncho knew that defendant hung out with Sureños and that defendant considered Poncho to be associated with Norteños. Poncho denied he was in fact a gang member but admitted he had a close family member who was in a Norteño gang. Poncho also admitted he had a tattoo of the word "Salas" on his back and that he previously had the roman numerals XIV on his hand.

C. Coparticipant Testimony

Julio Montoya Luna (Montoya), Juan Nunez, and Antonio Gayoso were coparticipants in the shooting of Perez. Montoya and Gayoso were members of the Mexican Pride Locos, a Sureño gang. Nunez and defendant were associated with the Vagos, a another Sureño gang.

Montoya and Nunez both entered into agreements with the prosecution, pursuant to which each pleaded guilty to being an accomplice and a gang member in exchange for testifying against defendant.[3]

Montoya and Nunez both testified about defendant's tattoos, which included the number 22 and the phrase " 'One Way.' " To get a tattoo of the number 22, which represents "V," the 22nd letter of the alphabet, a Vagos gang member must do a shooting. " 'One Way' " refers to a street in the Vagos territory.

Montoya and Nunez also testified about the Perez shooting. Earlier that day, a Sureño gang member named "Shaggy" had been shot. Afterwards, Nunez, defendant and other Sureño gang members had a discussion about how to respond. Nunez said he "could be the one" to do a retaliatory shooting; he wanted to "look good." Six of the Sureño gang members went looking for Norteños. They "didn't find anyone," although Nunez and two other Sureño gang members shot at a house where Norteños lived.

Nunez and defendant eventually went to the location of Shaggy's shooting. Gayoso approached Nunez, angry about the shooting. Defendant indicated that he had a gun and asked Gayoso "what did he want to do." Defendant borrowed a sweatshirt and gloves, then asked Nunez to "go with him to go riding," meaning to go find "someone to shoot at." Nunez called Montoya over and said, " 'The homies are going to go do some

[3] Gayoso did not testify at defendant's trial. In 2010, he was sentenced to a prison term of 25 years to life after he pleaded guilty to first degree murder (§187, subd. (a)) and admitted that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

riding. Do you want to go?' " Montoya understood this meant that they were going to look for rival Norteños.

Montoya drove one car with Nunez as his passenger. They followed Gayoso, who was driving another car with defendant as his passenger. At Terrace Street, defendant got out and fired his gun at Perez and Poncho. According to Montoya, defendant shot Perez three or four times, then kicked him, then fired the gun three or four more times. Nunez heard about six shots. He saw defendant shoot at Perez when Perez was on the ground.

Both cars drove away from the scene. Defendant and Nunez subsequently switched cars: Nunez got into Gayoso's car, and defendant got into Montoya's car. Defendant left the sweatshirt he had been wearing in Gayoso's car.

When Montoya and defendant were later arrested and transported to jail, defendant told him, " 'Don't worry. They have nothing against us.' " Defendant later instructed Montoya to " 'just say that it was someone else. That it wasn't me.' " Defendant told Montoya to invent a nickname and say the person had gone to Mexico.

At the time of the Perez shooting, both defendant and Nunez had no hair. They were about the same size and build.

D. Gang Expert

Salinas Police Officer Robert Zuniga testified as the prosecution's gang expert. He had attended the police academy in 2005 and had been working in the gang unit since March of 2008. At the time of trial, Officer Zuniga was working in the gang unit's street enforcement group, and he had previously worked as a gang intelligence officer. As a gang intelligence officer, he contacted gang members on a daily basis, often in informal settings. He had also obtained information about gangs from confidential reliable informants and other gang experts. In preparation for testifying about the various people involved in this case, he had reviewed documentation such as crime reports and field interview cards.

According to Officer Zuniga, Perez had no documented gang contacts. Officer Zuniga believed that Poncho and his brother were both active Norteño gang members, and that Gayoso, Montoya, Nunez, and defendant were all active Sureño gang members at the time of the Perez shooting.

Officer Zuniga explained why he believed defendant was an active Sureño gang member. First, he referred to defendant's tattoos, which included the number 22 and the phrases " 'One Way,' " " 'Most Wanted,' " and " 'Salinas Finest.' " Second, when defendant was arrested, he was in the company of other Sureño gang members, including two Sureño gang members who were hiding in a restroom, where a loaded firearm was found. Third, defendant had made a statement at juvenile hall to the effect that he was "not ready to leave the gang lifestyle." He had previously stated that he had been associating with Sureño gang members since the age of 13. Fourth, defendant had been involved in a number of prior incidents (including a prior incident in which shots were fired at an elementary school), during which he was associating with Sureño gang members or engaging in gang-related activities.[4] Fifth, defendant had been housed with Sureño gang members in jail.

Officer Zuniga testified that the primary activities of the Sureño gang are "a variety of crimes," including homicides, shootings, carjackings, robberies, and burglaries.

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[4] Officer Zuniga described the following incidents. On March 27, 2009, defendant left his transitional housing with another Sureño gang member. On July 28, 2008, defendant started an altercation in juvenile hall. On January 26, 2008, defendant was driving a vehicle that was pursued by police and which contained a firearm and ammunition. On January 18, 2008, defendant and another Sureño gang member were at an elementary school, in a vehicle that had been shot at. On September 11, 2007, defendant was involved in a fight with a Norteño gang member in the bathroom of a high school. On April 16, 2006, defendant was standing next to a vehicle that had stolen license plates, along with another Sureño gang member. On March 14, 2005, defendant and three other Sureño gang members were contacted regarding some gang-related graffiti. On January 14, 2005, defendant was contacted while associating with other Sureño gang members.

The prosecution established that Sureño gang members had engaged in a "pattern of criminal gang activity" (see § 186.22, subds. (a), (e), (f)) by introducing court documents showing criminal convictions for enumerated offenses and eliciting Officer Zuniga's testimony about each crime. The documents and testimony established the following.

First, on January 12, 2009, Valentine Rivas and Benjamin Carrillo challenged some Norteño gang members, then "opened fire," killing one of the Norteño gang members. Rivas and Carrillo were both convicted of homicide. Officer Zuniga testified that he was "familiar with" both defendants and with the incident, and he rendered an opinion that both were active participants in the Sureño criminal street gang.

Second, on August 10, 2008, Isaac Arriaga entered a market, where he brandished a BB gun and asked the clerk for "all of the money." Arriaga was convicted of robbery. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Arriaga was a Sureño gang member at the time.

Third, on February 25, 2007, Hugo Chavez and Hugo Cervantes fired guns at some Norteño gang members. They were found with a loaded firearm in their vehicle and were convicted of attempted murder and malicious shooting from a vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that both Chavez and Cervantes were active Sureño gang members at the time of the offenses.

Fourth, on February 11, 2007, Juan Rivas was in a vehicle with another Sureño gang member; a loaded firearm was found under his seat during a traffic stop conducted by another officer. Rivas was convicted of carrying a loaded firearm in his vehicle. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Rivas was a gang member at the time of the offense.

Fifth, on May 15, 2006, Adan Flores got into an argument with some Norteño gang members inside of a 7-Eleven, then shot and killed one of the Norteño gang

members. He was convicted of homicide. Officer Zuniga testified that he was "familiar with" the facts of the case, and he rendered an opinion that Flores was an active Sureño gang member at the time of the offense.

Given a hypothetical situation based on the facts of this case, Officer Zuniga opined that the crime was committed for the benefit of and in association with the Sureño gang, and that it promoted, furthered, and assisted the commission of criminal conduct by the Sureño gang.

E. Defense Case

The defense theory was that Nunez, not defendant, shot Perez. This theory was based primarily on testimony from Guadelupe Gastelum, an independent eyewitness.

Gastelum was visiting friends on Terrace Street at the time of the Perez shooting. He was standing in the street, talking to a friend, when he heard and saw a Mitsubishi Galant turn onto the street. He saw a male exit from the car and shoot at Perez. Gastelum estimated that he was about 300 to 320 feet away from the shooter. His location was about three houses down the street. When the shooter moved closer to Perez, Gastelum's vision was blocked by a fence.

According to Gastelum, the shooter wore a black shirt and blue pants. The shooter was bald and was not wearing a hat. The shooter's sweatshirt might have had a hood, but the hood was not on the shooter's head.[5]

Later that evening, Gastelum was brought to an infield show-up, where he viewed Nunez and Gayoso. He identified Nunez as the shooter, recognizing him because he was bald, wore a black shirt, and had the same build and skin color as the shooter. Gastelum identified Gayoso as the driver. The officer accompanying Gastelum to the show-up opined that Gastelum seemed "very sure" of his identifications.

[5] Gastelum's description of the shooter was somewhat inconsistent with Poncho's description. According to Poncho, defendant wore dark pants, a baseball cap, and a hooded sweatshirt.

F. Charges, Trial, and Sentencing

Defendant was charged with first degree murder (§ 187, subd. (a); count 1), attempted premeditated and deliberate murder (§§ 664/187, subd. (a); count 2) and active participation in a criminal street gang (§ 186.22, subd. (a); count 3). The District Attorney alleged that defendant committed the murder and attempted murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)), and that he personally used and intentionally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subds. (b), (c), (d)). The jury convicted defendant of all three charged offenses and found true all of the special allegations.

For count 1 (murder), the trial court imposed a term of 25 years to life, with a consecutive term of 25 years to life for personally and intentionally discharging a firearm and proximately causing death or great bodily injury (§ 12022.53, subd. (d)). For count 2 (attempted murder), the trial court imposed a consecutive term of 15 years to life, with a consecutive 20-year term for personally and intentionally discharging a firearm (§ 12022.53, subd. (c)), but it stayed a 10-year term for personally using a firearm (§ 12022.53, subd. (b)). The trial court stayed count 3 (active participation in a criminal street gang) pursuant to section 654. Defendant's aggregate sentence was 85 years to life.

DISCUSSION

A. Gang Expert Testimony

In his original briefing on appeal, defendant contended that certain opinion testimony by Officer Zuniga was based on testimonial hearsay and that its admission violated his Sixth Amendment right to confront witnesses. (See *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).) Defendant contended that the admission of the testimony was prejudicial as to count 3 (active participation in a criminal street gang) and the gang enhancements found true as to counts 1 and 2.

Specifically, defendant referred to three areas of Officer Zuniga's expert opinion testimony: (1) the testimony establishing a pattern of criminal gang activity by Sureño gang members; (2) the testimony about the primary activities of Sureño gang members; and (3) the testimony about defendant's statements and membership in the Sureño gang. According to defendant, Officer Zuniga's testimony about these topics was based on "police investigations and interviews conducted by others who did not testify." Defendant contended that this testimony was offered for its truth, was testimonial, and should have been excluded. However, defendant did not present such arguments below.

1. Forfeiture

In general, a defendant forfeits a confrontation claim by failing to object below. (See *People v. Redd* (2010) 48 Cal.4th 691, 730.) Defendant acknowledges that he "did not object to [Officer] Zuninga's [sic] testimony on Sixth Amendment or state hearsay grounds," but he contends the issue was not forfeited because an objection would have been futile in light of the case law at the time of trial. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [objection not required "if it would have been futile" in light of binding authority at the time].) Defendant notes that at the time of trial, California courts had uniformly rejected confrontation clause challenges to "basis evidence" from a gang expert. (E.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1131; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209.)

The Attorney General contends that an objection would not necessarily have been overruled. Officer Zuniga testified on April 10 and 11, 2012. The Attorney General points out that two weeks earlier, the California Supreme Court had granted review in a case presenting this issue. (See *People v. Archuleta* (2011) 202 Cal.App.4th 493, review granted March 28, 2012, S199979, review dismissed May 22, 2013.) The Attorney General further points out that similar confrontation clause issues were pending in the California Supreme Court and United States Supreme Court. (See, e.g., *People v. Dungo*

(2012) 55 Cal.4th 608 (*Dungo*) [statements in autopsy report describing condition of murder victim's body]; *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89] (*Williams*) [expert's reliance on DNA laboratory report].)

Defendant contends that if an objection was required to preserve this issue for appeal, trial counsel was ineffective for failing to object below.

We will assume that the confrontation clause argument was not forfeited and address the merits, as we would likely need to do if we considered the issue under the prism of defendant's ineffective assistance claim. (See *People v. Osband* (1996) 13 Cal.4th 622, 693.)

2. Confrontation Clause and "Basis Evidence"

"The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right 'to be confronted with the witnesses against him.' In *Crawford v. Washington* (2004) 541 U.S. 36 [(*Crawford*)] . . . , the high court held that this provision prohibits the admission of out-of-court *testimonial* statements offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination. [Citations.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158 (*Livingston*).)

"In *Davis v. Washington*[(2006)] 547 U.S. 813 [(*Davis*)], the court explained the difference between testimonial and nontestimonial statements made to the police. 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' [Citations.]" (*Livingston*, *supra*, 53 Cal.4th at pp. 1158-1159.)

At the time this court filed the original opinion in this case, the California Supreme Court had not yet considered whether the confrontation clause prohibits a gang expert from relying on hearsay to establish whether a particular gang meets the definition of a criminal street gang and to provide evidence that a particular crime was committed for the benefit of a gang. However, in *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*), the court had reasoned that, "[c]onsistent with [the] well-settled principles" concerning expert witness testimony, a detective "could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay." (*Id.* at p. 619.) *Gardeley* reasoned that gang experts can rely on inadmissible hearsay because such evidence is not offered as " 'independent proof' of any fact." (*Ibid*.) In the original opinion in this case, this court found it was required to follow *Gardeley*'s holding that the "basis evidence" was not offered as " 'independent proof' of any fact." (*Ibid*.) This court also found that most, if not all, of the "basis evidence" was "nontestimonial" under any of the definitions in the recent confrontation clause cases. (See *Crawford, supra,* 541 U.S. at p. 59 [declining to give a comprehensive definition of "testimonial" but stating that at a minimum, it includes prior testimony and police interrogations]; *Davis, supra,* 547 U.S. at p. 822 [statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"]; *Dungo, supra,* 55 Cal.4th at p. 619 [in addition to the "primary purpose" requirement, to be testimonial, a statement "must be made with some degree of formality or solemnity"].)

In *Sanchez,* the California Supreme Court held that "case-specific statements" related by a gang expert constituted inadmissible hearsay and that some of the statements constituted "testimonial" hearsay under the Sixth Amendment. (*Sanchez, supra,* 63 Cal.4th at pp. 670-671.) The California Supreme Court disapproved its prior opinion in *Gardeley, supra,* 14 Cal.4th 605, "to the extent it suggested an expert may properly

testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez, supra,* at p. 686, fn. 13.)

3. Analysis

In the supplemental briefing submitted after *Sanchez*, defendant contends Officer Zuniga related both "ordinary and testimonial hearsay" regarding defendant's gang membership, defendant's intent to benefit the gang, and the offenses introduced to show a "pattern of criminal gang activity" (§ 186.22, subds. (a), (e).).

In addressing defendant's claims, we first note that Officer Zuniga was never asked to specify the basis of his knowledge for any specific facts. We are hesitant to presume, as defendant does, that Officer Zuniga's testimony related case-specific hearsay or testimonial hearsay. In the absence of a timely and specific objection to a particular statement on hearsay or confrontation grounds, which places the burden on the government to establish the admissibility of the statement (see *Idaho v. Wright* (1990) 497 U.S. 805, 816), reviewing courts should not presume that the witness is relating hearsay or that an out-of-court statement given to a law enforcement officer under unclear circumstances, possibly without testimonial purpose, is testimonial. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [error must be affirmatively shown].)

We further note that according to Officer Zuniga, much of the information he based his opinions on came from his work as a gang intelligence officer. His testimony was largely based on contacts with gang members, confidential reliable informants, and other gang experts. Nothing in the record suggests, let alone establishes, that this information was "gathered during an official investigation of a completed crime" (*Sanchez, supra,* 63 Cal.4th at p. 694), that the information was given in a way that bore any degree of solemnity or formality (see *Williams, supra,* 567 U.S. at p. ___ [132 S.Ct. at p. 2260] (conc. opn. of Thomas, J.); *Dungo, supra,* 55 Cal.4th at p. 619) or that the information was provided through any kind of formal interrogation. (See *Davis, supra,*

547 U.S. at p. 822.) Additionally, nothing in the record indicates that the primary purpose of Officer Zuniga's information-gathering was to target defendant or any other individuals, to investigate a particular crime, or to establish past facts for a later specific criminal prosecution. (See *ibid*.)

We turn to the specifics of Officer Zuniga's testimony, beginning with the testimony used to establish a pattern of criminal gang activity by Sureño gang members. In the original opinion, this court noted that to the extent Officer Zuniga relied on the court records showing other Sureño gang members' criminal convictions, those court records did not constitute testimonial evidence as described in *Crawford*. (See *Crawford, supra,* 541 U.S. 36, at pp. 51-52, 68.) They were admissible as official records (see Evid. Code, § 1280) and hence reliance on them did not give rise to a confrontation clause violation. (See *id.* at p. 56; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [records that are "prepared to document acts and events relating to convictions and imprisonments" are beyond the scope of *Crawford*].) Defendant does not argue otherwise in the supplemental briefing filed after *Sanchez*.

In his original briefing, defendant's primary argument was that in testifying about the crimes establishing the requisite "pattern of criminal gang activity" (§ 186.22, subds. (a), (e), (f)), Officer Zuniga improperly relied on statements in police reports, which were presumably taken during police investigations for the primary purpose of establishing or proving "past events potentially relevant to later criminal prosecution." (*Davis, supra,* 547 U.S. at p. 822.) Defendant reiterates this argument in the supplemental briefing filed after *Sanchez.* However, details about the crimes that were committed by other Sureño gang members were unnecessary to prove the gang crime or the gang enhancement. For purposes of section 186.22, the predicate offenses required to establish a " 'pattern of criminal gang activity' " need not be " 'gang related.' " (*Gardeley, supra,* 14 Cal.4th at p. 621.) Rather, the " 'pattern' " is established by evidence that members of the gang "individually or collectively have actually engaged

in 'two or more' acts of specified criminal conduct committed either on separate occasions or by two or more persons." (*Id.* at p. 623.) The criminal conduct was proved by the court records from the cases of the individuals convicted of homicide, robbery, attempted murder and malicious shooting, and carrying a loaded firearm in a vehicle. The record does not show that Officer Zuniga related any hearsay or testimonial hearsay to the jury when rendering his opinions that the individuals involved in those crimes were Sureño gang members. Officer Zuniga was not asked about the specific facts on which he based those opinions, and he was entitled to rely on hearsay in rendering an opinion that a particular individual belonged to a gang. (See *Sanchez, supra,* 63 Cal.4th at p. 677.[6]) Although Officer Zuniga noted that he had reviewed crime reports and field interview cards in preparation for testifying about the various people involved in this case, he also specified that as a gang intelligence officer, he had daily informal contact with gang members, through which he learned about their gang affiilations. Moreover, the jury was entitled to consider the coparticipants' convictions stemming from the present offenses (i.e., the convictions of Montoya, Nunez, and Gayoso) when determining whether members of the Sureño gang had committed two or more predicate offenses. (See *People v. Loeun* (1997) 17 Cal.4th 1, 5 ["the requisite 'pattern' can also be established by evidence of the offense with which the defendant is charged and proof of another offense committed on the same occasion by a fellow gang member"].) Thus, any error in admitting Officer Zuniga's testimony about the details of the predicate offenses

[6] In *Sanchez*, the court gave the following example: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Sanchez, supra,* 63 Cal.4th at p. 677.)

was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

We next address Officer Zuniga's testimony that the primary activities of the Sureño gang are "a variety of crimes," including homicides, shootings, carjackings, robberies, and burglaries. This testimony was clearly based on Officer Zuniga's gang training and experience, and did not relate any "case-specific hearsay content" to the jury. (*Sanchez, supra,* 63 Cal.4th at p. 670.) Again, defendant does not argue otherwise in the supplemental briefing filed after *Sanchez*.

Finally, we address whether Officer Zuniga's testimony about defendant's prior police contacts and statements regarding his membership in the Sureño gang improperly related testimonial hearsay. In the supplemental briefing filed after *Sanchez,* defendant contends that "[m]ost of the evidence that [he] belonged to a gang" was based on testimonial hearsay. Defendant specifically identifies evidence of defendant's prior police contacts as the testimony that was improperly admitted. At trial, prior to testifying about those incidents, Officer Zuniga stated he had "reviewed" defendant's prior police contacts, indicating that his testimony "relate[d] hearsay information gathered during an official investigation of a completed crime." (*Sanchez, supra,* 63 Cal.4th at p. 694.) This challenged testimony was introduced to show that defendant was actively participating in a criminal street gang (§ 186.22, subd. (a)) and that he committed the murder and attempted murder "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (*id.*, subd. (b)(1)).

Assuming that under *Sanchez*, it was improper to admit Officer Zuniga's testimony about defendant's prior police contacts and statements regarding his membership in the Sureño gang, the error was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.) Officer Zuniga's challenged testimony was insignificant in comparison to the testimony of defendant's coparticipants, which

established that defendant was an associate of the Vagos, a Sureño gang; that defendant had a tattoo of the number 22, meaning he had done a shooting; that defendant had a tattoo referring to a street in Vagos territory; that defendant had been involved in a gang discussion about how to respond to the shooting of a Sureño gang member; that defendant said he wanted to go find someone to shoot at; and that defendant committed the shootings along with his fellow Sureño gang members. (See *Yates v. Evatt* (1991) 500 U.S. 391, 403 [under *Chapman*, "an error did not contribute to the verdict" if that error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"], disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) Poncho, the surviving victim, also provided evidence of defendant's association with Sureño gang members. In light of the evidence presented through defendant's coparticipants and Poncho, no reasonable jury would have failed to convict defendant of the substantive gang offense or found the gang allegations untrue if Officer Zuniga's challenged testimony had been excluded. The testimony of the coparticipants and Poncho constituted significant additional evidence that distinguishes this case from *Sanchez,* in which the admission of testimonial hearsay was prejudicial error because "[t]he main evidence of [the] defendant's intent to benefit [his gang] was [the expert's] recitation of testimonial hearsay." (*Sanchez, supra*, 63 Cal.4th at p. 699.)

B. Jury Misconduct

During the initial jury deliberations, a juror visited the scene of the Perez shooting and told the other jurors that it would have been difficult to make an identification from Gastelum's location. The trial court held a hearing and determined that the juror had committed misconduct, but that there was no prejudice. The trial court replaced the juror with an alternate and instructed the jury to begin deliberations anew and disregard anything that the juror had said. The trial court denied defendant's motion for a mistrial and his later motion for a new trial.

Defendant contends that the trial court erred by finding that the jury misconduct was not prejudicial.

1. Proceedings Below

The jury began deliberating on the afternoon of Friday, April 13, 2012. The jurors retired to deliberate at 3:06 p.m. and were excused at 4:45 p.m.

On Monday, April 16, 2012, the jury resumed deliberations at 9:00 a.m. At 9:15 a.m., the jury sent the trial court a note stating, "[Juror No. 55] went to the location of [the] shooting on Thurs. evening before the beginning of deliberations. No one was swayed by his statement."

The trial court indicated it believed that Juror No. 55 had committed misconduct and proposed that Juror No. 55 be removed. Defendant agreed there had been juror misconduct and requested a mistrial. The prosecutor advocated for a hearing to determine whether the misconduct was prejudicial.

The trial court called in Juror No. 55, who admitted he had gone to the scene of the shooting, out of "curiosity." He told the other jurors that he "went over there," and he said "that it was difficult to see what was happening when you're too far from there, from the street." Juror No. 55 had gone to the scene the prior Thursday, and he told the other jurors about his visit the next day. None of the other jurors said anything in response to his comment: "They just listened."

The trial court then called in the jury foreperson. The trial court asked if the other jurors had discussed Juror No. 55's comment. The foreperson indicated that some of the jurors had expressed "shock that he had done it" because of the trial court's admonition not to go to the scene.[7] The foreperson continued, "But nobody -- basically the point he

[7] At both the beginning and end of trial, the trial court had instructed the jury not to "visit the scene of any event involved in this case." (See CALCRIM Nos. 101, 201.)

brought up everybody had already decided on that point. Do I say what that point is or --" The trial court responded, "I don't think you need to."

The trial court asked, "Did the comment made by Juror Number 55 result in a conversation that would -- that [was] a part of your deliberations?" The foreperson responded, "No. Not really, no." The foreperson said that the jury had only discussed whether or not to report the incident to the court.

The trial court asked the foreperson to describe Juror No. 55's comment. The foreperson stated, "That he went to the location. Took a look from the point of view of Mr. G and said he didn't think that Mr. G could see that far to be able to identify a face." Juror No. 55 continued, "But everybody else had already made that decision, that we agreed that we did not believe that --" The trial court interrupted, saying, "I don't want to invade the province of the jury at this point."[8]

Defendant reiterated his request for a mistrial. The trial court denied the request and decided, instead, to dismiss Juror No. 55, admonish the remaining jurors, and bring in an alternate juror. The trial court explained the basis for its ruling: "The jurors did deliberate for over an hour on Friday. . . . And it appears to the Court that Juror Number 55 on Friday revealed that he had been to the scene of the event. And he quickly was told by the rest of the jurors that that was not an okay thing to do. . . . It does not appear that there were any discussions other than that was not an okay thing to do that were held between the other jurors regarding the comments that Juror [No.] 55 made."

[8] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

After dismissing Juror No. 55, the trial court admonished the remaining jurors as follows: "It is the Court's understanding that the -- there may have been a comment by a juror on information that he received from outside of the trial. So as trial jurors, the important thing for you to do is only deliberate and only consider the evidence that was received at trial. Anything that is received outside of the courtroom or seen or viewed or told to you outside of the courtroom is not to be considered at trial. And I will tell you specifically if you heard any comments made by Juror [No.] 55 regarding anything that he said or any information that he received either by viewing himself or heard from someone else outside of the trial is not to be considered by you." The trial court told the jurors that anything they heard from Juror No. 55 should be treated as "evidence that's stricken during the trial" and "should not be considered by you for any purpose."

The trial court suspended deliberations until the alternate juror could be brought in. When the alternate joined the jury, the trial court instructed the jurors that "the jury deliberation process begins anew." The jury reached its verdicts later that day.

Defendant subsequently brought a motion for a new trial based on the jury misconduct. The trial court denied the motion on June 21, 2012, finding that there was no prejudice.

2. Analysis

Due process requires a jury be " 'capable and willing to decide the case solely on the evidence before it . . . .' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*), italics omitted.) Thus, "[j]uror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias." (*Ibid.;* see also *In re Hitchings* (1993) 6 Cal.4th 97, 119 (*Hitchings*).)

"When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two

ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.)

The presumption of prejudice arising from juror misconduct " 'may be rebutted by proof that no prejudice actually resulted.' [Citations.]" (*Hitchings, supra,* 6 Cal.4th at p. 118.) More specifically, the presumption of prejudice " ' "may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . ." ' [Citations.]" (*Id.* at p. 119.) On appeal, whether prejudice arose from juror misconduct "is a mixed question of law and fact subject to an appellate court's independent determination. [Citations]." (*Nesler, supra,* 16 Cal.4th at p. 582.)

In this case, defendant contends the jury misconduct was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.) The test for inherent bias "is analogous to the general standard for harmless error analysis under California law. Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information." (*In re Carpenter* (1995) 9 Cal.4th 634, 653 (*Carpenter*).)

We disagree that the information conveyed by Juror No. 55 was "so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror." (*Nesler, supra,* 16 Cal.4th at pp. 578-579.) Although the accuracy of Gastelum's identification was an important issue at trial, Juror No. 55's misconduct did not

"completely undermine[]" the defense case, as defendant claims. The evidence had already established that Gastelum had viewed the scene from a distance of at least 300 feet and that his view was obscured when defendant shot at Perez from close range.[9] The evidence had also established that someone could have confused defendant and Nunez from such a distance, due to their similarities in size, build, and hairstyle. Additionally, pictures of the scene and Gastelum's location were introduced into evidence, so the jurors were able to assess the distance for themselves. (See *People v. Sutter* (1982) 134 Cal.App.3d 806, 821 [juror's description of her visit to the scene could not "possibly have added anything to what the jurors already knew" because of pictures introduced into evidence].) Thus, although Juror No. 55 committed misconduct, he did not introduce any evidence into the jurors' deliberations that was "so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*Carpenter, supra,* 9 Cal.4th at p. 653.)

Next, we consider whether it is "substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal.4th at pp. 578-579; see also *Carpenter, supra,* 9 Cal.4th at p. 654.) Under this test, " '[t]he presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record,* that there is no substantial likelihood that the complaining party suffered actual harm.' [Citation.]" (*Carpenter, supra,* 9 Cal.4th at p. 654.) "In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Ibid.*)

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[9] During argument to the jury, the prosecutor discredited Gastelum's identification of Nunez. He argued that Gastelum was too far from the shooting to make an accurate identification: "You can't see from that far away anybody's face."

Courts have often found that the presumption of prejudice arising from juror misconduct was rebutted because the trial court was apprised of the misconduct during deliberations and was able to implement "curative measures such as the replacement of the tainted juror with an alternate or a limiting instruction or admonition." (*People v. Holloway* (1990) 50 Cal.3d 1098, 1111, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; see also *People v. Dorsey* (1995) 34 Cal.App.4th 694, 704 [presumption of prejudice rebutted where trial court replaced the offending juror and instructed the jury to begin deliberations anew].) For instance, in *People v. Knights* (1985) 166 Cal.App.3d 46 (*Knights*), during deliberations, a juror learned that the defendant had previously killed a four-year-old child, and she told the rest of the jury what she had heard. The presumption of prejudice was rebutted, however, because "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Id.* at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror," and the remaining jurors "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid.*)

On this record, we find that the presumption of prejudice arising from Juror No. 55's misconduct was rebutted. Considering the nature of the jury misconduct and the fact that the extraneous material was not inconsistent with other evidence at trial, there was " 'no substantial likelihood' " that defendant " 'suffered actual harm' " from the jury misconduct. (*Carpenter, supra*, 9 Cal.4th at p. 654.) Further, in this case, similar to *Knights*, "the misconduct occurred early in the deliberations" and was quickly brought to the court's attention by the foreperson. (*Knights*, *supra*, 166 Cal.App.3d at p. 51.) "The potentially biased juror was excused and replaced with an alternate juror." (*Ibid.*) The remaining jurors were instructed not to consider anything Juror No. 55 said, and they "were instructed to begin deliberations again as if no deliberations had ever occurred." (*Ibid.*) Under the circumstances, it is not "substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra,* 16 Cal.4th at p. 579.)

C. Sentencing

In his original briefing, defendant contended that his sentence of 85 years to life was "the equivalent of life without parole," which constituted cruel and unusual punishment because he was a juvenile (age 17) at the time he committed the offense.

Defendant primarily relied on two recent decisions. First, he relied on *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*), where the United States Supreme Court held that the Eighth Amendment bars imposition of a mandatory sentence of life without the possibility of parole (LWOP) for a juvenile homicide defendant. Second, he relied on *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), where the California Supreme Court held—in the context of a juvenile nonhomicide offense—that a sentence of "a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy" is the functional equivalent of a LWOP sentence. (*Id.* at p. 268.)

The Attorney General argued, inter alia, that defendant's challenge to his sentence was moot due to the enactment of section 3051 (Sen. Bill No. 260 (2013-2014 Reg. Sess.)) after defendant's sentencing hearing.[10] Section 3051, inter alia, requires the Board of Parole Hearings (Board) to conduct youth offender parole hearings and makes youth offenders eligible for release on parole by at least the 25th year of incarceration. (§ 3051, subd. (b).) In *Franklin*, the court agreed with this argument, finding that section

[10] The Attorney General also originally argued that defendant forfeited his cruel and unusual punishment claim by failing to object below on that ground. In response, defendant pointed out that he was sentenced on June 21, 2012—prior to both the *Miller* and *Caballero* decisions. This court found that because there was no California or United States Supreme Court case on point at the time of sentencing, this issue was not forfeited by defendant's failure to raise it below. (See *People v. Black* (2007) 41 Cal.4th 799, 810 [forfeiture rule does not apply when " 'the pertinent law' " changes unforeseeably].) Citing *Caballero*, the Attorney General also originally argued that defendant's claim could only be brought in a petition for writ of habeas corpus filed in the trial court. This court disagreed, noting that because defendant's case was still pending on direct appeal, the judgment was not yet final.

3051 effectively superseded sentences like the one imposed in this case. (*Franklin, supra,* 63 Cal.4th at p. 277.) As noted by the *Franklin* court, in determining whether to grant parole at a youthful offender parole hearing, the Board is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c); see *Franklin, supra,* at p. 277.) Under the new statutes, youthful offenders such as defendant "will have a meaningful opportunity for release no more than 25 years into their incarceration." (*Franklin, supra,* at p. 277.)

In light of the California Supreme Court's decision in *Franklin,* defendant now acknowledges that his claim is effectively moot. Defendant contends, and the Attorney General concedes, that this case must be remanded for a limited hearing pursuant to *Franklin*. As explained below, we agree.

1. Proceedings Below

The probation report reflected that defendant not only maintained his innocence, but he claimed to know " 'nothing' " about the offense. It further reflected that defendant's family (his mother, father, and two younger siblings) lived in Mexico, that defendant had completed the 11th grade, that he had used alcohol once, and that he denied using drugs.

The probation report also reflected that defendant's juvenile criminal history began in May of 2005, when he committed an attempted burglary, vandalism, theft, and resisting arrest. He violated probation twice in 2005, once in 2006, twice in 2007, three times in 2008, and twice in 2009. Some of the probation violations involved the commission of new offenses. In 2009, defendant absconded from a placement. Additionally, defendant had been subject to four disciplinary reports while in jail for the present offense.

At the sentencing hearing, defendant requested the trial court impose concurrent terms for the murder and attempted murder, arguing that they constituted "one incident." He also claimed he was innocent.

The trial court responded, "[Y]ou murdered a young 15-year old in cold blood." For count 1 (murder), the trial court imposed a term of 25 years to life, with a consecutive term of 25 years to life for personally and intentionally discharging a firearm and proximately causing great bodily injury or death, pursuant to section 12022.53, subdivision (d). For count 2 (attempted murder), the trial court imposed a consecutive term of 15 years to life, with a consecutive 20-year term for personally and intentionally discharging a firearm, pursuant to section 12022.53, subdivision (c).

The trial court noted that it had found a number of factors in aggravation, which applied to defendant's conviction of actively participating in a criminal street gang (count 3). Although it stayed the term for that conviction pursuant to section 654, the trial court noted its findings: (1) the crime involved great violence, great bodily injury, and a high degree of cruelty, viciousness, and callousness; (2) the victims were particularly vulnerable; (3) the crime involved planning; (4) defendant had a continuing relationship with a criminal street gang; (5) defendant's violent conduct indicated he was a serious danger to society; (6) defendant was the subject of prior sustained juvenile petitions, indicating an escalation in his criminal conduct; (7) defendant had a significant juvenile criminal history; (8) prior efforts at rehabilitation had been unsuccessful; and (9) defendant's prior performance on probation had been unsuccessful. In deciding to impose consecutive sentences for the murder and attempted murder, the trial court made findings that (1) the victims were particularly vulnerable and (2) the incidents were separate, since defendant had fired numerous shots.

2. Analysis

In *Franklin*, the court explained that the new statutory scheme "contemplate[s] that information regarding the juvenile offender's characteristics and circumstances at the

time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*Franklin, supra,* 63 Cal.4th at p. 283.) The court noted that section 3051, subdivision (f)(2) provides that " '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board' " and that "[a]ssembling such statements . . . is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin, supra,* at pp. 283-284.) The court found it was "not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.) Thus, the court remanded the matter to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*) The *Franklin* court specified that if the trial court later determined "that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence." (*Ibid*.)

At the sentencing hearing in this case, the trial court did not have the guidance of the *Miller* or *Caballero* decisions, and the sentencing hearing predated the enactment of section 3051. Both parties acknowledge that in imposing sentence, the trial court did not consider or make a record of the *Miller* factors, including defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," his "family and home environment," and "the way familial and peer pressures may have affected him." (*Miller, supra,* 132 S.Ct. at p. 2468.) Thus, as the parties agree, a limited remand is required so that the trial court can make such a record in accordance with *Franklin*.

DISPOSITION

The judgment is reversed and the matter is remanded for the limited purpose of giving defendant an "opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*People v. Franklin* (2016) 63 Cal.4th 261, 284.)

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.